A **KONDISI UTAMA SDN BHD v. BALTIC AGENCIES PTE LTD & ANOTHER APPEAL**

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
HASAN LAH FCJ
B AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
PRASAD SANDOSHAM ABRAHAM FCJ
[CIVIL APPEALS NO: 02(f)-89-12-2015(T) & 02(f)-90-12-2015(T)]
16 AUGUST 2018

C

CONTRACT: *Breach – Agreement – Project involving dredging, reclamation and marine infrastructure development works – Failure to make requisite payment for dredgers and vessels supplied – Whether there was contract between parties – Whether joint venture existed – Whether there was implied contract made partly* D *in writing and partly by conduct and performance between parties – Whether obligations involved in executing works shared by parties – Whether intention of parties that companies would work together – Whether one party deliberately sidelined and deprived of gains – Whether there was breach of contract*

E There were two appeals herein, Appeal 89 and Appeal 90. The appeals were by Kondisi Utama Sdn Bhd ('Kondisi') and Eastern Pacific Industrial Corporation Bhd ('EPIC') respectively, against the decision of the Court of Appeal in allowing the appeals by Baltic Agencies Pte Ltd ('Baltic') against the decisions of the High Court in dismissing Baltic's claim against EPIC and Kondisi. The dispute which led to these appeals was related to a project F involving dredging, reclamation and marine infrastructure development works ('the works'). Baltic claimed to have been awarded a subcontract for the works by Kondisi or, alternatively, claimed that EPIC had awarded a contract for the works to Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV ('JV') a joint venture consisting of Kondisi and itself. Baltic then brought G this action against EPIC and Kondisi. Baltic's pleaded case was that it was appointed by Kondisi as the latter's subcontractor, as shown in the letters dated 10 May 2011 and 2 August 2011. It had, pursuant to the appointment, expended money and time and effort towards the acquisition of dredgers for the works. The works done by Baltic was within the knowledge of EPIC's Chief Executive Officer and representative ('Ramli') and Kondisi's Director H and representative ('Amarjeet'). Baltic claimed that, as a result of the representation and inducement of EPIC and Kondisi, it had entered into an agreement dated 7 October 2011 with AA Dredgers Pte Ltd ('AA Dredgers') for the supply of dredgers. Amarjeet witnessed the agreement and EPIC had issued the letter dated 14 October 2011, (signed by Ramli), addressed to I 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV' requesting that arrangements be made for the obtaining of domestic shipping licenses for the dredger, anchor boat and tugboat ('KSE Vessels'). Baltic claimed that EPIC

wanted the works to be performed jointly by Baltic and Kondisi under/in the name of 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV' which was reflected in EPIC's letter of offer dated 30 October 2011 inviting the JV to undertake the works. The letter stated that the first payment of 5% of the contract sum was to be paid to the JV within five business days upon the arrival of the first dredger boat at the site of the works. The KSE Vessels arrived and the payment was due. Baltic, however, claimed that instead of paying the JV, EPIC paid the said 5% to Kondisi. Thus, Baltic was not able to pay AA Dredgers for the KSE Vessels. Consequently, AA Dredgers was not able to pay KSE Marine Works Sdn Bhd ('KSE') from whom AA Dredgers sourced the KSE Vessels, leading to KSE terminating its contract with AA Dredgers. According to Baltic, EPIC then dealt directly with KSE and used the KSE Vessels obtained by Baltic from KSE through AA Dredgers for the works. Baltic claimed that EPIC and Kondisi had conspired to take over the works without regard for the inducement and representations made by them to Baltic and in breach of the agreement and contract between Baltic and Kondisi and between EPIC and JV, therefore depriving Baltic of the revenue that it expected to gain from the works. EPIC's defence was that it did not have privity of contract with Baltic and the only contract it entered into in relation to the works was with Kondisi. Kondisi, in its defence, denied appointing Baltic as its subcontractor and denied forming the JV with Baltic. After a full hearing, the High Court dismissed Baltic's claim. The Court of Appeal, however, found on a perusal of the evidence in totality that a contract made partly in writing, partly by conduct and/or performance subsisted between Baltic and Kondisi and between EPIC and the JV. The contract between Kondisi and Baltic arose, according to the Court of Appeal, from the letters dated 10 May 2011 and 2 August 2011, the conduct of Kondisi's director, Amarjeet as well as the performance by Baltic. The Court of Appeal's finding of the existence of a contract between EPIC and the JV was based on the undated letter issued by EPIC in August 2011 and the letters dated 14 October 2011 and 30 October 2011 and the conduct of Ramli and the performance by Baltic.The breach of the contracts came about, according to the Court of Appeal, when neither EPIC nor Kondisi made the requisite payments for the dredgers under the contract between AA Dredgers and Baltic. The Court of Appeal allowed Baltic's appeal and consequently ordered general damages to be assessed for the breach of contracts as well as interest as claimed by Baltic. Aggrieved by the decision and orders of the Court of Appeal, EPIC and Kondisi applied for leave to appeal to the Federal Court, which was granted.The issue that arose was whether the Court of Appeal was correct in its findings that an implied contract had been made partly in writing (based on the letters mentioned above) and partly by conduct and/or performance between Baltic and Kondisi and between EPIC and the unincorporated JV.

Held (dismissing appeals with costs)
Per Zaharah Ibrahim FCJ delivering the judgment of the court:

(1) In relation to the contract claimed by Baltic to have come into existence between itself and Kondisi, subsequent to the letter dated 10 May 2011 from Kondisi appointing Baltic as its subcontractor, oral evidence showed that there was a meeting on 30 July 2011 at EPIC's office and this was followed by the letter dated 2 August 2011 again appointing Baltic as Kondisi's subcontractor but this time with specific mention of the dredging vessel Sical Portofino. The appointment by the letter dated 2 August 2011 was accepted by Baltic as signified by the signature of its managing director and Baltic's stamp. This letter was not disputed by Kondisi. (paras 68 & 69)

(2) As early as March 2011, EPIC had already been awarded the contract by the State Government. EPIC began to find contractor(s) to perform the works for it. The evidence by Ramli and PW2, the Director Commercial for Baltic at the time, was that a letter of intent was issued by EPIC to Baltic for the works. In the letter dated 10 May 2011, Kondisi represented that EPIC had awarded the abovementioned works to them. The letter gave specific information of the scope of the works said to have been awarded to Kondisi. It was inconceivable that Kondisi could offer a contract with those details and that contract sum without having already been awarded a contract for the works by EPIC with those details and without knowing the value of its own contract with EPIC. There was also evidence of the trip to India in April 2011 facilitated by Baltic to enable Ramli to view Sical Portofino with Kondisi's representatives joining him. EPIC had, by the time of the trip to India, been awarded the main contract for the works by the State Government and certainly by 10 May 2011 had already awarded Kondisi a contract for the works. (paras 80 & 82-85)

(3) Baltic was EPIC's initial choice as contractor. The snag was that as a Government-linked company of the State Government, EPIC was obliged to engage a Malaysian company and that was how Kondisi came into the picture despite Kondisi's then clear lack of capital or experience and had absolutely no experience in dredging works or even shipping. EPIC understood Kondisi's total lack of expertise and expected Kondisi to work with someone else who had dredging expertise. The emails tendered in evidence and the oral evidence of, *inter alia,* Ramli and Amarjeet clearly showed that it was Baltic who made efforts at its own expense to obtain Sical Portofino. EPIC, through Ramli, had been involved in the choice of dredgers to be obtained for the works and he had clearly been dealing with Baltic, with the involvement of Kondisi. (paras 88, 89 & 91-93)

(4) The totality of the evidence clearly showed that while neither EPIC nor Kondisi was a party to the 7 October 2011 agreement between Baltic and AA Dredgers or the agreement dated 13 October 2011 between AA Dredgers and KSE, EPIC and Kondisi were all along not only aware of Baltic's efforts to procure dredgers for the works in place of Sical Portofino, but had also agreed to such replacements. The manner in which the parties conducted themselves gave rise to only one conclusion; that EPIC was dealing with Kondisi and Baltic as if Kondisi and Baltic were in a JV for the works. (paras 101 & 102)

(5) The contents of the letter dated 2 August 2011 showed that pursuant to the meeting held on 30 July 2011, the parties had in all likelihood agreed that the works would be undertaken by Baltic and Kondisi jointly. Hence, the JV. The said 2 August 2011 letter showed that the obligations involved in executing the works would be shared by Kondisi and Baltic. Thus, the said letter supported the finding that it was always the intention of the parties that Kondisi and Baltic would work together to perform the works. (paras 101, 113 & 115)

(6) A contract had come into existence between EPIC and the informal JV partnership of Kondisi and Baltic. That JV clearly existed and EPIC and Kondisi had clearly admitted its existence by the actions taken by Ramli and Amarjeet. Evidence showed that EPIC had breached that contract by offering Kondisi the contract by the letter dated 16 October 2011 and Kondisi had breached its joint venture agreement with Baltic by accepting that offer on 17 October 2011 and subsequently choosing to utilise the KSE vessels procured by Baltic and keeping Baltic out of the works. All this lend credence to Baltic's claim that EPIC and Kondisi had deliberately sidelined Baltic and deprived it of the gains it would have received had EPIC proceeded with the contract with the JV. The Court of Appeal was correct in allowing Baltic's claim and ordering damages to be assessed. (paras 122 & 128-130)

Bahasa Malaysia *Headnotes*

Terdapat dua rayuan, iaitu Rayuan 89 dan Rayuan 90. Rayuan-rayuan difailkan oleh Kondisi Utama Sdn Bhd ('Kondisi') dan Eastern Pacific Industrial Corporation Bhd ('EPIC') terhadap keputusan Mahkamah Rayuan yang membenarkan rayuan-rayuan oleh Baltic Agencies Pte Ltd ('Baltic') terhadap keputusan-keputusan Mahkamah Tinggi yang menolak tuntutan Baltic terhadap EPIC dan Kondisi tetapi membenarkan tuntutan balas EPIC terhadap Baltic. Pertikaian yang menimbulkan rayuan-rayuan ini adalah berhubung projek melibatkan pengorekan, penebusgunaan dan infrastruktur laut ('kerja-kerja'). Baltic menuntut telah diawardkan subkontrak kerja-kerja itu oleh Kondisi atau secara alternatif menuntut bahawa EPIC telah mengawardkan kontrak kerja-kerja itu kepada Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV ('JV'), satu usaha sama antara Kondisi dan Baltic. Baltic

kemudian memulakan guaman ini terhadap EPIC dan Kondisi. Baltic memplidkan telah dilantik oleh Kondisi sebagai subkontraktor seperti yang dilihat dalam surat-surat bertarikh 10 Mei 2011 dan 2 Ogos 2011. Baltic telah, susulan pelantikan, membelanjakan wang, masa dan usaha terhadap pemerolehan kapal korek untuk kerja-kerja itu. Kerja-kerja yang dibuat oleh Baltic diketahui Ketua Pegawai Eksekutff EPIC ('Ramli') dan Pengarah dan wakil Kondisi ('Amarjeet'). Baltic mendakwa akibat perwakilan dan dorongan EPIC dan Kondisi, Baltic memasuki satu perjanjian bertarikh 7 Oktober 2011 dengan AA Dredgers Pte Ltd ('AA Dredgers') untuk bekalan kapal korek. Amarjeet menyaksikan perjanjian itu dan EPIC telah mengeluarkan surat bertarikh 14 Oktober 2011, (ditandatangani oleh Ramli), yang dialamatkan kepada 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV' meminta supaya aturan dibuat untuk mendapatkan lesen perkapalan dalam negeri untuk kapal korek, kapal labuh dan kapal penunda ('KSE Vessels'). Baltic mendakwa EPIC mahu kerja-kerja dilaksanakan secara usaha sama oleh Baltic dan Kondisi bawah/dalam nama 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV' seperti yang digambarkan dalam surat tawaran EPIC bertarikh 30 Oktober 2011 mempelawa JV untuk menjalankan kerja-kerja itu. Surat menyatakan bahawa bayaran pertama 5% daripada jumlah kontrak akan dibayar kepada JV dalam tempoh lima hari apabila kapal korek pertama tiba di tapak kerja-kerja itu. KSE Vessels tiba dan bayaran dijangka. Baltic, walau bagaimanapun, mendakwa EPIC tidak membayarnya tetapi membuat bayaran 5% kepada Kondisi. Oleh itu, Baltic tidak dapat membuat bayaran kepada AA Dredgers untuk KSE Vessels. Seterusnya, AA Dredgers tidak dapat membayar KSE Marine Works Sdn Bhd ('KSE') yang telah memberi KSE Vessels kepada AA Dredgers, dan akibatnya KSE membatalkan kontraknya dengan AA Dredgers. Menurut Baltic, EPIC terus berurusan dengan KSE dan menggunakan KSE Vessels yang diperoleh oleh Baltic daripada KSE melalui AA Dredgers untuk kerja-kerja itu. Baltic mendakwa EPIC dan Kondisi berkomplot untuk mengambil alih kerja-kerja itu tanpa mengambil kira rangsangan dan perwakilan yang dibuat kepada Baltic dan dalam pelanggaran perjanjian dan kontrak antara Baltic dan Kondisi dan antara EPIC dan JV, dengan itu menafikan Baltic daripada pendapatan yang dijangka akan diperolehi daripada kerja-kerja itu. Pembelaan EPIC adalah EPIC tidak mempunyai priviti kontrak dengan Baltic dan hanya memasuki satu kontrak dengan Kondisi berhubung kerja-kerja itu. Kondisi, dalam pembelaannya, menafikan melantik Baltic sebagai subkontraktornya dan menafikan memasuki JV dengan Baltic. Selepas perbicaraan penuh, Mahkamah Tinggi menolak tuntutan Baltic. Mahkamah Rayuan, walau bagaimanapun, mendapati, atas penelitian keterangan secara keseluruhan, bahawa satu kontrak dibuat sebahagiannya secara bertulis, sebahagiannya dengan kelakuan dan/atau penyampaian antara Baltic dan Kondisi dan antara EPIC dan JV. Kontrak Kondisi dan Baltic timbul, menurut Mahkamah Rayuan, daripada surat-surat bertarikh 10 Mei 2011 dan 2 Ogos 2011, tindakan pengarah Kondisi, Amarjeet serta pelaksanaan Baltic.

Kontrak didapati wujud antara EPIC dan JV oleh Mahkamah Rayuan berdasarkan surat tidak bertarikh yang dikeluarkan oleh EPIC pada Ogos 2011 dan surat-surat bertarikh 14 Oktober 2011 dan 30 Oktober 2011 serta tindakan Ramli dan pelaksanaan Baltic. Menurut Mahkamah Rayuan, pelanggaran kontrak-kontrak berlaku apabila EPIC dan Kondisi tidak membuat bayaran yang diperlukan untuk kapal-kapal korek bawah kontrak antara AA Dredgers dan Baltic. Mahkamah Rayuan membenarkan rayuan Baltic dan memerintahkan agar ganti rugi am ditaksir untuk pelanggaran kontrak-kontrak serta faedah seperti yang dituntut Baltic. Terkilan dengan keputusan dan perintah-perintah Mahkamah Rayuan, EPIC dan Kondisi memohon kebenaran merayu ke Mahkamah Persekutuan, dan ini dibenarkan. Isu yang timbul adalah sama ada Mahkamah Rayuan betul dalam dapatannya bahawa satu kontrak tersirat dimeterai sebahagiannya secara bertulis (berdasarkan surat-surat yang disebut di atas) dan sebahagiannya melalui tindakan dan/atau pelaksanaan antara Baltic dan Kondisi dan antara EPIC dan JV yang tidak diperbadankan.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Zaharah Ibrahim HMP menyampaikan penghakiman mahkamah:

(1) Berhubung kontrak yang Baltic dakwa wujud antaranya dan Kondisi, menurut surat bertarikh 10 Mei 2011 daripada Kondisi melantik Baltic sebagai subkontraktornya, keterangan lisan menunjukkan terdapat mesyuarat pada 30 Julai 2011 di pejabat EPIC dan ini disusuli surat bertarikh 2 Ogos 2011 yang juga melantik Baltic sebagai subkontraktor Kondisi namun kali ini dengan pernyataan spesifik kapal korek Sical Portofino. Pelantikan melalui surat bertarikh 2 Ogos 2011 diterima oleh Baltic seperti yang disahkan oleh tandatangan pengarah urusan dan cap Baltic. Surat ini tidak dipertikaikan oleh Kondisi.

(2) Seawal Mac 2011, EPIC telah diawardkan kontrak oleh Kerajaan Negeri. EPIC mula mencari kontraktor-kontraktor untuk menjalankan kerja-kerja itu. Keterangan Ramli dan PW2, Pengarah Komersial Baltic pada waktu itu, adalah bahawa satu surat niat telah dikeluarkan oleh EPIC ke Baltic untuk kerja-kerja itu. Dalam surat bertarikh 10 Mei 2011, Kondisi menggambarkan bahawa EPIC telah mengawardkan kerja-kerja itu kepadanya. Surat itu memberikan maklumat spesifik berkenaan skop kerja-kerja yang dikatakan diawardkan kepada Kondisi. Adalah mustahil Kondisi boleh menawarkan kontrak dengan butir-butiran dan jumlah kontrak itu tanpa diawardkan dengan kontrak untuk kerja-kerja itu oleh EPIC terlebih dahulu dengan butiran-butiran tersebut dan tanpa mengetahui nilai kontraknya dengan EPIC. Terdapat juga keterangan berkenaan lawatan ke India pada April 2011 yang dikendalikan oleh Baltic bagi membolehkan Ramli melihat Sical Portofino dengan wakil-wakil Kondisi menyertai sekali. EPIC telah,

sebelum lawatan ke India, diawardkan dengan kontrak utama untuk kerja-kerja itu oleh Kerajaan Negeri dan dengan itu sebelum 10 Mei 2011 telah mengawardkan Kondisi kontrak untuk kerja-kerja itu.

(3) Baltic adalah kontrak pilihan pertama EPIC. Tetapi sebagai syarikat berkaitan kerajaan dengan Kerajaan Negeri EPIC diwajibkan mengambil syarikat Malaysia dan Kondisi adalah syarikat yang dipilih walaupun Kondisi tidak mempunyai modal atau pengalaman dan tidak mempunyai apa-apa pengalaman dalam kerja-kerja pengorekan atau perkapalan. EPIC memahami Kondisi tidak mempunyai kepakaran dan menjangkakan Kondisi bekerja dengan pihak lain yang mempunyai kepakaran pengorekan. Emel-emel yang dikemukakan untuk keterangan dan keterangan lisan, antara lain, Ramli dan Amarjeet, jelas menunjukkan bahawa Baltic telah berusaha dengan perbelanjaannya sendiri untuk memperoleh Sical Portofino. EPIC, melalui Ramli, terlibat dengan pilihan kapal-kapal korek yang diperoleh untuk kerja-kerja itu dan dia telah dengan jelasnya berurusan dengan Baltic, melalui penglibatan Kondisi.

(4) Keseluruhan keterangan dengan jelasnya menunjukkan walaupun EPIC dan Kondisi bukan pihak dalam perjanjian bertarikh 7 Oktober 2011 antara Baltic dan AA Dredgers atau perjanjian 13 Oktober 2011 antara AA Dredgers dan KSE, EPIC dan Kondisi bukan sahaja mengetahui usaha-usaha Baltic untuk memperoleh kapal-kapal korek untuk kerja-kerja itu bagi menggantikan Sical Portofino, tetapi juga telah bersetuju untuk penggantian sedemikian. Cara pihak-pihak terlibat mengendalikan diri mereka membawa kepada hanya satu kesimpulan; bahawa EPIC berurusan dengan Kondisi dan Baltic bagaikan Kondisi dan Baltic dalam satu usaha sama untuk kerja-kerja tersebut.

(5) Kandungan-kandungan surat bertarikh 2 Ogos 2011 menunjukkan menurut mesyuarat yang diadakan pada 30 Julai 2011, pihak-pihak telah bersetuju kerja-kerja akan dilaksanakan oleh Baltic dan Kondisi secara usaha sama. Oleh itu, JV ini. Surat bertarikh 2 Ogos tersebut menunjukkan kewajipan-kewajipan yang terlibat dalam menjalankan kerja-kerja itu akan dikongsi oleh Kondisi dan Baltic. Oleh itu, surat tersebut menyokong dapatan bahawa adalah niat pihak-pihak untuk Kondisi dan Baltic bekerja bersama bagi melaksanakan kerja-kerja itu.

(6) Oleh itu, satu kontrak antara EPIC dan perkongsian usaha sama tidak rasmi Kondisi dan Baltic wujud. Usaha sama itu dengan jelasnya wujud dan EPIC dan Kondisi telah dengan jelasnya mengakui kewujudannya melalui tindakan-tindakan yang diambil Ramli dan Amarjeet. Keterangan menunjukkan bahawa EPIC telah melanggar kontrak dengan menawarkan Kondisi dengan kontrak melalui surat bertarikh 16 Oktober 2011 dan Kondisi telah melanggar perjanjian usaha sama dengan Baltic dengan menerima tawaran pada 17 Oktober 2011 dan seterusnya memilih untuk menggunakan KSE Vessels yang diperolehi

Baltic dan tidak membenarkan Baltic terlibat dalam kerja-kerja itu. Semua ini membuktikan kebenaran tuntutan Baltic bahawa EPIC dan Kondisi telah dengan sengaja mengetepikan Baltic dan menafikan keuntungan yang sepatut diterimanya jika EPIC meneruskan kontrak dengan JV. Mahkamah Rayuan betul dalam membenarkan tuntutan Baltic dan memerintahkan taksiran ganti rugi.

Case(s) referred to:

Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals [2015] 1 CLJ 719 FC ***(refd)***

Sinar Wang Sdn Bhd v. Ng Kee Seng [2004] 3 CLJ 679 CA ***(refd)***

Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78

(Civil Appeal No: 02(f)-89-12-2015(T))

For the appellant - Harpal Singh Grewal, Teh Boon Eng & Reny Rao; M/s Teh & Assocs

For the respondent - Muhammad Shafee Abdullah, Jasbeer Singh & Revathi Kamalanathan; M/s Jasbeer Nur & Lee

(Civil Appeal No: 02(f)-90-12-2015(T))

For the appellant - Shahul Hameed Amirudin, Norliza Rasool Khan, Bryan Teo Wee Xin & Farah Shuhadah Razali; M/s Zul Rafique & Partners

For the 1st respondent - Muhammad Shafee Abdullah, Jasbeer Singh, Revathi Kamalanathan; M/s Jasbeer Nur & Lee

For the 2nd respondent - Harpal Singh Grewal, Teh Boon Eng & Reny Rao; M/s Teh & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Zaharah Ibrahim FCJ:

Introduction

[1] There are two related appeals before us, Appeal No. 02(f)-89-12-2015(T) ("Appeal No. 89") and Appeal No. 02(f)-90-12-2015(T) ("Appeal No. 90").

[2] The appeals are appeals by Kondisi Utama Sdn Bhd ("Kondisi"), who was the second defendant in the High Court, and Eastern Pacific Industrial Corporation Bhd ("EPIC"), who was the first defendant in the High Court, respectively, against the decision of the Court of Appeal allowing the appeals by Baltic Agencies Pte Ltd ("Baltic"), who was the plaintiff in the High Court, against the decisions of the High Court which dismissed Baltic's claim against EPIC and Kondisi but allowed the counterclaim by EPIC against Baltic.

[3] To avoid confusion, each of the parties will be referred to in this judgment by its name as abbreviated above.

A **Background Facts**

[4] The dispute which led to these appeals before us relates to a project involving dredging, reclamation and marine infrastructure development works at Pulau Kuching, Kemaman Terengganu ("the works").

B **[5]** Baltic claimed to have been awarded a subcontract for the works by Kondisi or alternatively claimed that EPIC had awarded a contract for the works to "Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV" ("JV") a joint venture consisting of Kondisi and itself. However, Baltic claimed that EPIC and Kondisi had breached those contracts.

C **[6]** Baltic then brought this action against EPIC and Kondisi.

At The High Court

Baltic's Claims

[7] Baltic's pleaded case was that it was appointed by Kondisi as the
D latter's subcontractor as shown in the letters dated 10 May 2011 and 2 August 2011. It had, pursuant to that appointment, expended money and time and effort towards the acquisition of dredgers for the works. The work done by Baltic was within the knowledge of EPIC's Chief Executive Officer and representative, Ramli Shahul Hameed ("Ramli"), and Kondisi's director
E and representative, Amarjeet Singh ("Amarjeet").

[8] Baltic claimed that as a result of the representation and inducement of EPIC and Kondisi, it had entered into an agreement dated 7 October 2011 with AA Dredgers Pte Ltd ("AA Dredgers") for the supply of three dredgers of different sizes. This was well within the knowledge of the defendants as
F Amarjeet witnessed the agreement and EPIC had issued the letter dated 14 October 2011 (signed by Ramli) addressed to "Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV" requesting that arrangements be made for the obtaining of domestic shipping licences for the dredger, anchor boat and tugboat named in the letter ("KSE vessels"). The KSE vessels had in fact
G arrived at the site of the works on 24 October 2011.

[9] In para. 13 of the amended statement of claim, Baltic claimed that EPIC wanted the works to be performed jointly by Baltic and Kondisi under/ in the name of "Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV". This was reflected in EPIC's letter of offer dated 30 October 2011 (signed by
H Ramli) inviting the JV to undertake the works.

[10] The letter stated that the first payment of 5% of the contract sum was to be paid to the JV within five business days upon the arrival of the first dredger boat at the site of the works. As the contract amount was erased, Baltic did not know the value of the contract being offered. Nonetheless, as
I the KSE vessels had arrived on 24 October 2011, the payment of 5% of the contract sum was due.

[11] Baltic claimed that instead of paying the JV, EPIC paid Kondisi the 5%. This meant that Baltic was not able to pay AA Dredgers for the KSE vessels. Consequently, AA Dredgers was not able to pay KSE Marine Works Sdn Bhd ("KSE") from whom AA Dredgers sourced the KSE vessels, leading to KSE terminating its contract with AA Dredgers.

[12] EPIC then, according to Baltic, dealt directly with KSE and used the KSE vessels obtained by Baltic from KSE through AA Dredgers for the works. Baltic claimed that EPIC and Kondisi had conspired to take over the works without regard for the inducement and representations made by them to Baltic and in breach of the agreement and contract between Baltic and Kondisi and between EPIC and the JV. They had therefore deprived Baltic of the revenue that it expected to gain from the works.

EPIC's Defence

[13] EPIC's defence was that it did not have privity of contract with Baltic. The only contract it entered into in relation to the works was with Kondisi. That was the contract the terms of which were contained in the letter dated 16 October 2011. Under the terms of that letter/contract, Kondisi was obliged to procure the vessel Sical Portofino. This Kondisi failed to do, thus breaching the contract.

[14] EPIC also claimed that the undated letter and the letter dated 30 October 2011 were issued to Kondisi at Kondisi's request to enable a joint venture to be formed between Kondisi and Baltic to facilitate the procurement of dredgers for the works. In any case, claimed EPIC, the letters had not been formally issued as EPIC's and Kondisi's stamps had not been affixed on each page, and were therefore not binding.

Kondisi's Defence

[15] Kondisi in its defence denied appointing Baltic as its subcontractor. The letters dated 10 May 2011 and 2 August 2011, said Kondisi, were not letters of appointment of Baltic as a subcontractor for the works but merely to enable Baltic to procure Sical Portofino.

[16] Indeed, claimed Kondisi, it was only appointed by EPIC on 17 October 2011 when it accepted EPIC's offer for the works.

[17] Kondisi denied knowledge of the letter dated 30 October 2011 and denied forming the JV with Baltic. It claimed that it was Baltic who had been trying to get it to agree to the JV which never materialised.

[18] Kondisi also denied being a party to the contracts/agreements with AA Dredgers and/or KSE.

[19] It was Kondisi's contention that as a result of an *ad interim* injunction order obtained by Baltic on 24 April 2012, Kondisi and its agents were not able to proceed with the works and EPIC was not able to make progress payments to Kondisi for work already done. This led to other components

of the works to be adversely affected and no work could proceed. Kondisi thus counterclaimed for the loss it claimed it suffered as a result of the *ad interim* order.

High Court Decision

[20] After a full hearing, the High Court dismissed Baltic's claim with costs and allowed Kondisi's counterclaim with costs.

[21] The learned trial judge held that there was no contract between EPIC and Baltic, or between Kondisi and Baltic. The letters relied upon by Baltic to show the existence of the contract with Kondisi were, according to the learned trial judge, merely letters of offer that envisaged the execution of a further agreement, which agreement was not produced in court. The learned trial judge also found that no joint venture existed and that Baltic's appointment by Kondisi was conditional upon Baltic's procurement of Sical Portofino for the works.

[22] Baltic appealed against the decision to the Court of Appeal.

At The Court Of Appeal

[23] The Court of Appeal, after hearing the parties, allowed Baltic's appeal.

[24] The Court of Appeal found, "on a perusal of the evidence in totality that a contract made partly in writing, partly by conduct and/or performance" subsisted between Baltic and Kondisi and between EPIC and the JV.

[25] The contract between Kondisi and Baltic arose, according to the Court of Appeal, from the letters dated 10 May 2011 and 2 August 2011, the conduct of Kondisi's director, Amarjeet, as well as the performance by Baltic.

[26] The Court of Appeal's finding of the existence of a contract between EPIC and the JV was based on the undated letter issued by EPIC in August 2011 and the letters dated 14 October 2011 and 30 October 2011, respectively, and the conduct of Ramli and the performance by Baltic.

[27] The Court of Appeal also found, alternatively, that the contract between EPIC and the JV superseded the contract between Kondisi and Baltic.

[28] The breach of the contracts (which the Court of Appeal said "are contracts implied in fact", "suggested from the facts and circumstances that indicate a mutual intention to contract") came about, according to the Court of Appeal, when neither EPIC nor Kondisi "made the requisite payments for the dredgers under the contract between AA Dredgers and Baltic".

[29] The breach of contracts, according to the Court of Appeal, was compounded by "their" direct dealing with KSE "thereby preventing Baltic from performing its part of the contract/s with EPIC and/or Kondisi Utama to provide a dredger for the dredging sub-works".

[30] The Court of Appeal found that the declarations sought by Baltic in paras. (a), (aa), (c) and (cc) of its amended statement of claim and the order for specific performance sought in para. (b) of the amended statement of claim "cannot be granted as they refer to specific documents as constituting the entire contract between the parties". However, the Court of Appeal was of the view that prayer (r) of the amended statement of claim "may be relied upon to grant Baltic a declaration that contracts subsisted as set out above". The Court of Appeal relied on a statement in the judgment in the case of *Sinar Wang Sdn Bhd v. Ng Kee Seng* [2004] 3 CLJ 679, that "The court of equity may therefore mould the relief that is to be granted on particular facts".

[31] The Court of Appeal consequently ordered general damages to be assessed for the breach of contracts as well as interest as claimed by Baltic in para. (p) of the amended statement of claim.

At The Federal Court: Leave To Appeal

[32] Aggrieved by the decision and orders of the Court of Appeal, EPIC and Kondisi applied for leave to appeal to the Federal Court. Leave to appeal was granted by this court to EPIC and Kondisi on 1 December 2015.

Leave Questions

[33] The questions of law for which leave to appeal was granted by the Federal Court ("leave questions") are as follows:

Kondisi's Appeal (Appeal No. 89)

(i) Where a plaintiff's pleaded case is premised on a contract between a joint venture company and a defendant, can the plaintiff who is not a privy to or party to the contract maintain an action against the defendant without the joint venture company being impleaded as a party and can the court order damages to be paid to the plaintiff when the innocent party is the joint venture company?

(ii) Where the pleaded case of the plaintiff is that a contract subsists between party A and a joint venture company comprising of the plaintiff and party B and the court having found that there was such a contract and party A is in breach of the contract, can the court in law order damages against both party A and party B?

(iii) Whether for a court to declare that an implied contract subsists between two parties, the court must first be satisfied that all the requirements for the formation of a contract, *viz*, offer and acceptance, consideration, intention to create legal relations, and certainty of terms must be satisfied before the court will imply the existence of a contract?

EPIC'S Appeal (Appeal No. 90)

(i) Whether an appellate court, in the absence of a specific and a credible claim pleading a joint venture agreement which is, in any event, wholly devoid of particulars in the statement of claim and which in any event,

A after hearing witnesses is rejected by the trial court, may infer that the first respondent (ie, the plaintiff) had indeed intended to bring such a joint venture into existence and proceed to assist the first respondent (plaintiff) to better its pleadings and if so, to what extent the appellate court may depart from the original pleadings in granting relief(s) if any.

B (ii) Whether in law, a stat-owned and/or appointed entity (ie, the first defendant) may be held liable to a third party (the plaintiff) either by conduct or inference, when that third party is part of an unincorporated joint venture with another entity (the second defendant) and which other entity (the second defendant) had privity of contract with the state entity C (the first defendant).

(iii) Whether in law, in the total absence of evidence, can the court grant an order and/or relief to an unincorporated joint venture particularly where the claim was not pleaded as a joint venture arrangement and where the evidence shows that a joint venture entity was never created D or intended to exist at all, in the circumstances where the reliefs and/or order would be rendered unenforceable and in vain.

At The Federal Court: Appeal

Submissions

E Submissions By Kondisi

[34] Kondisi submitted that the proposal for the formation of a joint venture company by Baltic and Kondisi did not materialise. Baltic did not seek relief by way of declaration that there was a joint venture between Baltic F and Kondisi known as "Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV".

[35] Kondisi contended that the trial judge was correct when His Lordship held that the various letters relied upon by Baltic as proof of the existence of a contract between Baltic and Kondisi were invalid because they were not G dated. Further, these letters envisaged a further formal agreement to be executed by the parties, which agreement was not produced by Baltic.

[36] Kondisi submitted that the Court of Appeal erred when it held that there was an implied contract between Baltic, EPIC and Kondisi. Kondisi pointed out that in respect of the undated letter (referred to in paras. 14 and H 15 of the amended statement of claim):

(a) the contract sum was not stated;

(b) the conditions precedent in items 3.1 and 3.2 were never satisfied by Baltic and/or the JV company;

I (c) Baltic and/or the JV company did not prepare a project schedule as required by item 2(vi);

(d) Baltic and/or the JV company did not signify its acceptance by signing and returning the original copy as required by item 6.

[37] In respect of the letter dated 30 October 2011, it was submitted by Kondisi that:

(a) the contract sum had been blanked out;

(b) the quantum of the first payment under the payment schedule is not stated;

(c) the conditions precedent to the commencement of works under item 3.1 (a), (b), (c) and (d) were not complied with by Baltic and/or the JV company;

(d) the JV company did not signify its acceptance of the letter of offer by signing and returning the original copy of the letter of offer.

[38] Baltic's pleaded case, according to Kondisi, was that an express contract existed between Kondisi and the JV. Kondisi contended that as parties are bound by their pleaded case it was not open to the court to make a finding of the existence of an implied contract. When a party has failed in law to establish the existence of an express contract, the Court of Appeal cannot make an implied contract for the parties. Hence, the Court of Appeal erred in rejecting the finding of fact by the learned High Court Judge that there was no contract between EPIC and the JV.

Submissions By EPIC

[39] EPIC submitted that Baltic failed to plead that a joint venture company was incorporated by Baltic and Kondisi or that a joint venture agreement was concluded between Baltic and Kondisi.

[40] EPIC submitted that Baltic also did not plead that the claim was brought on behalf of and for the purported joint venture company or that all acts of Baltic, *inter alia* in sourcing the dredgers, were for the benefit of the purported JV. In fact, Baltic's claim against Kondisi was pursuant to contracts dated 10 May 2011 and 2 August 2011 between Baltic and Kondisi, which fortified the fact that Baltic's claim was not pursuant to the purported joint venture company (which never came into existence) but was indeed Baltic's personal claim.

[41] EPIC contended that the facts as pleaded by Baltic as set out in the amended statement of claim were not the basis for a claim by the unincorporated joint venture company or a claim of contract by implied facts. The evidence adduced at trial also supported the fact that there was no joint venture between Baltic and Kondisi.

[42] EPIC submitted that in the absence of pleadings, evidence if any, produced by the parties, cannot be considered by the court and no party should be permitted to travel beyond its pleadings. Hence, it was contended by EPIC that the Court of Appeal cannot decide a suit on matters which were not pleaded.

[43] EPIC claimed that as the contract for the works was awarded to Kondisi, EPIC had merely advised parties to work together with Kondisi. The work done by Baltic was in relation to the contract dated 2 August 2011 between Baltic and Kondisi. EPIC confirmed that there was no contract between Baltic and EPIC. Hence, there was no privity of contract between Baltic and EPIC.

Baltic's Submissions

[44] Baltic submitted that EPIC and Kondisi had never accepted that the unincorporated JV was a separate legal entity. In fact, it had always been the position of EPIC and Kondisi that the JV was never created or intended to exist at all.

[45] Furthermore, it had always been Baltic's case that EPIC and Kondisi had worked together to cheat Baltic. As such, Baltic by itself could never commence an action by pleading the JV as a party to this action.

[46] Baltic contended that both EPIC and Kondisi had colluded with each other and not made any payment either to the JV or to Baltic and had instead wrongfully and with malice made the payment to Kondisi alone. It was clear from the evidence produced by EPIC during the assessment trial that EPIC had made payment of RM36,176,913.83 to Kondisi. As such, EPIC and Kondisi could not now evade the payment of damages suffered by Baltic.

[47] Hence, Baltic submitted that the Court of Appeal was correct when it held that both EPIC and Kondisi were in breach of their contract with Baltic and ordered that damages suffered by Baltic be assessed.

[48] Baltic submitted that although both EPIC and Kondisi had denied any knowledge of any dealings with Baltic, nevertheless all evidence and documents showed that both EPIC and Kondisi had dealings with Baltic and had full knowledge of the matter.

[49] Baltic further submitted that Kondisi was bound by the appointment letters dated 10 May 2011 and 2 August 2011 and should be estopped from disputing them. Actions by both EPIC and Kondisi had caused Baltic to procure the dredgers. The same dredgers procured by Baltic were used for the works by Kondisi.

[50] EPIC had proceeded to issue the undated letter of appointment and letters dated 14 October 2011 and 30 October 2011 to the JV. Hence, both EPIC and Kondisi should be made responsible when Baltic was sidelined and not allowed to proceed with the works.

[51] Baltic submitted that it was correctly held by the Court of Appeal that the contract between EPIC and the JV superseded the subcontract between Baltic and Kondisi.

[52] Baltic further submitted that the Court of Appeal did not 'better' Baltic's pleadings since the joint venture was already pleaded. As such, the question as to what extent the Court of Appeal may depart from the original pleadings did not arise.

[53] Baltic contended that EPIC being the owner of the works had testified through Ramli that Kondisi had appointed Baltic to do the works. This appointment was evidenced by the work that had been undertaken by Baltic and confirmed by the e-mails to both EPIC and Kondisi.

[54] Baltic submitted that it was clear that the JV was formed on the instruction and with the knowledge of EPIC. It was also clear from the fresh evidence which was only revealed by EPIC during the trial for assessment of damages at the High Court that EPIC had recognised the said JV and had also made a large payment in the range of RM36 million to Kondisi based on instructions from the JV.

[55] Baltic contended that EPIC, having made that payment to Kondisi, cannot now deny that there was privity of contract between EPIC and the JV. Baltic submitted that EPIC must also pay Baltic's portion under the JV.

Fresh Evidence: Letter Dated 4 August 2011

[56] On 6 September 2017 when hearing of this appeal commenced, we allowed the application by Baltic to adduce fresh evidence in the form of a letter dated 4 August 2011 signed by one Muhammad bin Hamzah who described himself as the general manager and who wrote for "Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV".

Our Analysis

[57] The reliefs prayed for by Baltic are as follows:

(a) *satu perintah perisytiharan bahawa kontrak bertarikh 30.10.2011 antara Defendan Pertama dan Kondisi Utama Sdn. Bhd. Baltic Agencies Pte Ltd JV adalah sah, berkuat kuasa dan mengikat Defendan-defendan*;

(aa) satu perintah perisytiharan bahawa kontrak bertarikh 10.5.2011 dan 2.8.2011 antara Defendan Kedua dan Baltic Agencies Pte Ltd adalah sah, berkuat kuasa dan mengikat Defendan-defendan;

(b) satu perintah perlaksanaan spesifik terhadap Defendan-defendan mengarahkan Defendan-Defendan untuk mematuhi kontrak yang telah dipersetujui dan Plaintif dibenarkan untuk meneruskan dengan kerja-kerja projek tersebut samada di bawah syarikat Plaintif dan atau JV;

(c) secara alternatifnya satu perintah perisytiharan bahawa Defendan Pertama telah memungkiri kontrak bertarikh 30.10.2011 tersebut kerana telah gagal, ingkar dan cuai dalam melaksanakan dan mematuhi terma-terma dan syarat-syarat kontrak tersebut;

A (cc) *secara alternatifnya satu perintah perisytiharan bahawa Defendan Kedua telah memungkiri kontrak bertarikh 10.5.2011 dan 2.8.2011 tersebut kerana telah gagal, ingkar dan cuai dalam melaksanakan dan mematuhi terma-terma dan syarat-syarat kontrak tersebut*:

(d) secara lanjutan dan/atau alternatif, gantirugi khas berjumlah
B USD21.45 juta **daripada Defendan Pertama dan/atau Defendan Kedua** untuk menggantikan perlaksanaan spesifik kontrak terhadap projek tersebut;

(e) secara lanjutan dan/atau alternative gantirugi khas berjumlah US 15 juta daripada Defendan Pertama dan/atau Defendan Kedua akibat
C perlanggaran kontrak **oleh Defendan Pertama**;

(f) secara lanjutan dan/atau alternatifnya, gantirugi am untuk ditaksirkan oleh Mahkamah yang Mulia ini dan dibayar oleh Defendan-defendan kepada Plaintif atas kemungkinan dan/atau penyangkalan kontrak oleh Defendan Pertama dan Defendan Kedua;

D (g) perintah injuksi interim menurut Aturan 29 Kaedah 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dan/atau mana-mana daripada mereka daripada meneruskan, menyempurnakan dan melengkapkan segala bentuk kerja
E yang melibatkan projek yang dikenali sebagai "dredging, reclamation and marine infrastructure development works at Pulau Kuching, Kemaman, Terengganu" (kemudiannya dirujuk sebagai projek tersebut) atau sebarang kerja yang akan memberikan kesan kepada Plaintif sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

F (h) perintah injunksi tetap menurut Aturan 29 Kaedah 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dalam apa jua carapun daripada melantik sebarang
G kontraktor lain dan/atau pihak ketiga dan/atau KSE Marine Works Pte Ltd (200400697K) untuk menggantikan Plaintif sebagai kontraktor untuk projek tersebut dan atau untuk meneruskan dengan sebarang kerja berkenaan projek tersebut yang akan memberikan kesan kepada Plaintif sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

H (i) Perintah injunksi tetap menurut Aturan 29 Kaedah 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dalam apa jua carapun daripada berurusan, membuat
I menandatangani dan menyempurnakan sebarang dokumen dengan mana-mana pihak berkenaan dengan projek tersebut yang akan membawa apa jua kesan terhadap kepentingan Plaintif sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(j) perintah injunksi interim menurut Aturan 29 Kaedah 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dalam apa jua carapun daripada mengeluarkan atau melepaskan sebarang pembayaran atau wang dalam apa jua bentuk dan cara sekali pun kepada Defendan Kedua dan/atau KSE Marine Works Pte Ltd (200400697K) atau mana-mana orang berkenaan dengan projek tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(k) perintah injunksi interim menurut Aturan 29 Kaedah 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dalam apa jua carapun daripada mengeluarkan atau melepaskan sebarang pembayaran atau wang dalam apa jua bentuk dan cara sekali pun kepada KSE Marine Works Pte Ltd (200400697K) atau mana-mana pihak ketiga dan atau sesiapa berkenaan dengan projek tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(l) perintah injunksi menurut Aturan 29 Kaedah 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk melarang, menahan dan/atau mencegah Defendan Pertama dan/atau Defendan Kedua samada secara sendiri ataupun melalui pengarah-pengarahnya, pekerja-pekerja ataupun agen-agennya dan/atau mana-mana dari mereka daripada mengeluarkan sebarang notis ke atas Plaintif berkenaan projek tersebut sehingga selesai perbicaraan prosiding ini dan/atau sehingga perintah selanjutnya daripada Mahkamah ini.

(m) perintah bahawa Defendan Pertama dan/atau Defendan Kedua diarahkan untuk membekalkan dan mendedahkan "jumlah penuh kontrak" yang telah sepatutnya disiratkan dalam surat perlantikan bertarikh 30.10.2011 daripada Defendan Pertama dalam tempoh empat belas (14) hari daripada tarikh perintah ini diberikan oleh Mahkamah Yang Mulia ini.

(n) perintah bahawa Defendan Pertama diarahkan untuk membekalkan dan mendedahkan segala butir-butir akaun-akaun yang menunjukkan pelepasan pembayaran kepada Defendan Kedua dan/atau mana-mana pihak berkenaan projek tersebul dalam tempoh empat belas (14) hari daripada tarikh perintah ini diberikan oleh Mahkamah Yang Mulia ini.

(o) perintah bahawa Defendan Kedua diarahkan unluk membekalkan dan mendedahkan segala butir-butir akaun-akaun yang menunjukkan pelepasan pembayaran kepada mana-mana pihak berkenaan projek tersebut dalam tempoh empat belas (14) hari daripada tarikh perintah ini diberikan oleh Mahkamah Yang Mulia ini.

(p) Faedah ke atas gantirugi-gantirugi am yang dirujuk dalam prayer-prayer (d) dan (e) di atas pada kadar 8% setahun dari 1.11.2011 sehingga tarikh penyelesaian penuh;

A (q) Kos pada dasar indemniti; dan

(r) Apa-apa relif, perintah, arahan, akaun dan siasatan yang Mahkamah yang Mulia ini fikir patut dan wajar diberikan.

[58] The reliefs claimed by Baltic against EPIC and Kondisi can be summarised as follows:

B

(i) a declaration that the contract dated 30 Ocober 2011 was a valid and binding contract between EPIC and the JV;

(ii) a declaration that the contract dated 10 May 2011 and 2 August 2011 was a valid and binding contract between Baltic and Kondisi;

C

(iii) an order for specific performance of the contracts, or alternatively declarations that EPIC and Kondisi had breached their contracts with the JV and Baltic, respectively;

(iv) special damages of USD 21.45million as an alternative to specific
D performance or USD 15million for breach of contract; or general damages to be assessed;

(v) injunctions to injunct EPIC and Kondisi and/or their directors and/or servants and/or agents from proceeding to execute the works; or from appointing any other contractors to continue with or complete the
E works; or from making any payment to any party for the works or from executing any documents that would prejudice Baltic pending the outcome of the suit;

(vi) an order that EPIC and/or Kondisi provide and disclose the contract price that should have been expressed in the contract dated 30 October
F 2011;

(vii) an order that EPIC provide and disclose detailed accounts with regard to the payments it made to Kondisi or any other party for the works.

[59] The injunctions sought were apparently no longer an issue by the time
G the trial ended in the High Court.

[60] Thus, what were left were declarations as to the validity of the contract that Baltic claimed it had entered into with Kondisi pursuant to the letters dated 10 May 2011 and 2 August 2011 and the contract Baltic claimed EPIC had entered into with the JV based on the undated letter and the letter
H dated 30 October 2011; as well as the specific performance of those contracts or, alternatively, damages for breach of those contracts.

[61] Before dealing with the issue of implied contract, we will address the issue of the letters dated 30 October 2011, 10 May 2011 and 2 August 2011.

I

Letter Dated 30 October 2011

[62] In para. 13 of the amended statement of claim, Baltic claimed the existence of EPIC's inducement and representations for the works to be undertaken by both Baltic and Kondisi jointly under the name of "Usahasama Kondisi Utama Sdn Bhd. Baltic Agencies Pte Ltd. JV". In other words, the JV that Baltic said had been offered the contract in the undated letter and the letter dated 30 October 2011 was an unincorporated joint venture.

[63] A perusal of the letter of offer dated 30 October 2011 signed by Ramli and addressed to the JV at Kondisi's address, appears to have had the contract sum erased. The amount of first payment of the contract sum had also been erased.

[64] The letter dated 30 October 2011 states:

> 6. This Letter of Offer is sent to you in duplicate. Kindly signify your acceptance by signing at the space provided below and return the original copy duly signed and witnessed to the undersigned within five (5) days from the date hereof, and retain the duplicate copy for your record.

[65] Paragraph 2 of the letter states that "With the acceptance of this letter of offer, you are hereby informed that a legal and binding contract exists between you and Eastern Pacific Industrial Corporation Berhad" based on the terms set out in the letter.

[66] There was no dispute that this letter was not signed and the original was not returned to Ramli. PW1 in his evidence admitted that it was not signed.

[67] In the absence of the acceptance of the offer in the manner stipulated in para. 6 of the letter, there cannot be in existence a contract by virtue of that letter of offer dated 30 October 2011.

Letters Dated 10 May 2011 And 2 August 2011

[68] In relation to the contract claimed by Baltic to have come into existence between itself and Kondisi, we note that subsequent to the letter dated 10 May 2011 from Kondisi appointing Baltic as its subcontractor, oral evidence shows that there was a meeting on 30 July 2011 at EPIC's office and this was followed by the letter dated 2 August 2011 again appointing Baltic as Kondisi's subcontractor but this time with specific mention of the dredging vessel Sical Portofino. In our view, the letter dated 2 August 2011 had clearly superseded the letter dated 10 May 2011.

[69] The appointment by the letter dated 2 August 2011 was accepted by Baltic as signified by the signature of its Managing Director, Captain Shaukath Ali ("Shaukath") and Baltic's stamp. The letter was not disputed by Kondisi. What was disputed by Kondisi was the performance of the contract formed pursuant to the acceptance of the letter.

[70] Kondisi claimed that Baltic had breached the 2 August 2011 contract when it failed to procure Sical Portofino as required under the contract.

[71] We note that the Court of Appeal declined to grant the reliefs prayed for by Baltic in paras. 37(a), (aa), (b), (c) and (cc) of the amended statement of claim "as they refer to specific documents as constituting the entire contract between the parties".

[72] The Court of Appeal, however, decided to grant a declaration pursuant to para. 37(r) of the amended statement of claim. The Court of Appeal found that:

> (i) a contract made partly in writing, partly by conduct and/or performance subsists between Baltic/appellant and Kondisi Utama/2nd respondent, as well as between EPIC/1st respondent and the unincorporated JV known as 'Kondisi Utama Sdn Bhd Baltic Agencies Pte Ltd JV';
>
> (ii) the contract between Baltic and Kondisi "arises from the letters of 10 May 2011, 2 August 2011, and the conduct of its director, Amarjeet Singh as well as the fact of performance by Baltic" and that their relationship was that of "contractor and sub-contractor respectively";
>
> (iii) the contract between EPIC and the JV "arises from the undated letter issued by EPIC in August 2011, the letter of 14 October 2011 and 30 October 2011 together with the conduct of its Chief Executive Officer Ramli Shahul Hameed and the fact of performance by Baltic".

[73] As mentioned earlier, the Court of Appeal also found in the alternative that the contract between EPIC and the JV superseded the subcontract between Baltic and Kondisi.

[74] The Court of Appeal held that "these contracts are contracts implied in fact. A contract implied in fact is not expressed by the parties, but rather suggested from the facts and circumstances that indicate a mutual intention to contract. Circumstances exist that, according to the ordinary course of dealing and common understanding, demonstrate such an intent that is sufficient to support a finding of implied contract. We found this to be the case based on the evidence before the court". The Court of Appeal quoted the following passage from *Chitty's on Contract*:

> Agreement is not a mental state, but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds but by what they have said or written or done

[75] Was the Court of Appeal correct in making the finding that implied contracts subsisted between the parties? Unfortunately, in their broad grounds, the Court of Appeal did not explain the reasons for their finding. Therefore, we need to examine the relevant oral and documentary evidence, in particular the conduct of the parties, in order to answer that question.

EPIC's Contract With Kondisi

[76] EPIC's and Kondisi's position was that the contract for the works only came into being on 17 October 2011 when Kondisi accepted EPIC's letter of offer dated 16 October 2011, and that there was no contract before that. Impliedly therefore, Kondisi was saying that it could not have entered into any contract with Baltic.

[77] Kondisi in its defence dismissed the letter dated 2 August 2011 as merely a letter to enable Baltic to "berurusan dengan Kapal Korek bernama SICAL PORTOFINO" and "untuk membolehkan plaintif menetapkan kapal pengorekan atau dredger yang dikenali sebagai SICAL PORTOFINO yang mana walau apa pun juga tidak berlaku".

[78] To determine whether Kondisi's own contract for the works came into existence only upon its acceptance of EPIC's letter of offer dated 16 October 2011, we need to begin with the award to EPIC of the contract for the works by the State Government.

[79] Ramli went to great lengths to avoid informing the court of the date EPIC entered into the main contract with the State Government for the works, repeatedly claiming that he could not remember. It was quite improbable that Ramli could not remember the date a multi-million ringgit contract was awarded to the company he was the CEO of. He tried to give the impression that the contract was only awarded to EPIC after August 2011. After examining the evidence, we do not agree that the contract was only awarded to EPIC after August 2011.

[80] It is quite clear to us that as early as March 2011 EPIC had already been awarded the contract by the State Government. It was for that reason that EPIC had begun to find contractor(s) to perform the works for it. The evidence by Ramli and PW2 (who was holding the post of Director Commercial for Baltic) was that a letter of intent was issued by EPIC to Baltic for the works. That letter was not in evidence as it was not allowed by the court to be admitted. In his witness statement, PW2 gave the following evidence:

Question 4	: Can you explain how you came to know about this dredging project?
Answer	: Captain Khaja Shaukath Ali and I were briefed about this project through Encik Omar & his team of friends whom we met in March 2011. I was informed that they were sourcing for dredgers for the said project at Kemaman. They had approached us based on the Plaintiff's experience in the shipping industry.
	Based on the requirements that they briefed us, the Plaintiff had identified an Indian dredger, SICAL Portofino for the project and had presented the same.

A Question 5 : What happened thereafter?

Answer : The Plaintiff received a letter of intent from the main employer, the First Defendant who had informed that they were given the approval from Terengganu State Government to do the dredging works and the First Defendant was inviting the Plaintiff to participate in the dredging activities and also have shown interest to visit the dredger.

B

[81] We note that when PW2 was cross-examined by EPIC's counsel, the fact that a letter of intent was sent to Baltic in March 2011 did not appear to be disputed by EPIC:

C

Ms. Norliza : What letter are you talking about?

PW-2 : Letter from EPIC to Baltic Agencies inviting us to participate in dredging activities at Pulau Kuching, Kemaman

D Ms. Norliza : Now that letter was disallowed by this Court. you saw this letter personally when it was sent?

PW-2 : Yes, it is there with us.

Ms. Norliza : were it arrived at Baltic

E PW-2 : It was with Capt. Shaukath Ali. Yes I see the letter.

Ms. Norliza : Did you see prior to this action in Court today?

PW-2 : Yes

Ms. Norliza : and you will know then that the headings say Letter of Intent. Do you agree?

F PW-2 : Yes.

...

Ms. Norliza : You gather information based on this letter of intent?

G PW-2 : Correct.

Ms. Norliza : And then your contract with Kondisi came into being only in May?

PW-2 : Yes.

Ms. Norliza : So you did all that works from March to May. Yes?

H PW-2 : Even after that.

Ms. Norliza : I know. I'm only talking about March to May. So if there is no contract, all that costs would have been yours, Baltic

PW-2 : Yes

I

[82] In the letter dated 10 May 2011 Kondisi represented that EPIC "has awarded the above-mentioned works to us". The letter gave specific information of the scope of the works said to have been awarded to Kondisi:

1. Dredging works to a depth of 5m below Chart Datum and dispose the dredged material to onshore reclamation area or to an area as specified by us at rate of RM10.70 per m3 for a quantity of 4,887,000 m3.

2. Dredging works to a depth of 5m below Chart Datum and dispose the dredged material to onshore reclamation area or to an area as specified by us at rate of RM10.70 per m3 for a quantity of 693,000 m3.

The total sub-contract sum shall be RM59,706,000.00.

[83] To our minds, it is inconceivable that Kondisi could offer a contract with those details and that contract sum without having already been awarded a contract for the works by EPIC with those details and without knowing the value of its own contract with EPIC.

[84] We also have the evidence of the trip to India in April 2011 facilitated by Baltic to enable Ramli to view Sical Portofino, with Kondisi's representatives joining him.

[85] Quite obviously, EPIC had, by the time of the trip to India, been awarded the main contract for the works by the State Government and certainly by 10 May 2011 had already awarded Kondisi a contract for the works.

[86] In Ramli's witness statement, he said, in reply to the question whether to his knowledge there was any contract between Baltic and Kondisi:

Tiada kontrak formal tetapi ini jelas terlihat melalui surat-surat Defendan Kedua dan Plaintif bertarikh 10.5.2011 dan 2.8.2011.

[87] If Kondisi did not have the contract for the works until the letter of offer dated 16 October 2011, how could there be a contract, informal though it may be, between Kondisi and Baltic in May-August 2011 for the very same works?

EPIC's Implied Contract With The JV

[88] There is no doubt in our minds that it was Baltic that was EPIC's initial choice as contractor, as was clear from PW2's evidence reproduced above. The snag was, as can be seen from Ramli's oral evidence, that as a Government-linked company of the State Government EPIC was obliged to engage a Malaysian company. That was how Kondisi came into the picture despite Kondisi's then clear lack of capital or experience.

[89] Oral and documentary evidence showed that Kondisi was a RM2 company at the time it was "chosen" by Ramli/EPIC to be the main contractor for the works. Amarjeet admitted that it was a "shelf" company. Amarjeet also admitted that Kondisi had absolutely no experience in dredging works or even shipping.

[90] Ramli was not able to give any reasonable answer as to why Kondisi was chosen for the works, a multi-million ringgit project. It became clear, upon sifting the various contradictory and evasive answers he gave during cross-examination, that Kondisi was chosen because it was a Malaysian company and because of the low price.

[91] It is quite obvious from Ramli's oral evidence during cross-examination that EPIC understood Kondisi's total lack of expertise and expected Kondisi to work with someone else who had dredging expertise. We reproduce below *verbatim* the relevant part of that evidence:

S74 : In simple terms, dredging works. Setuju right?

J : Ya.

S75 : So before a contractor can be appointed as contractor, it should have dredging experience. Do you agree?

J : No. As long as they have somebody they can prove to us the work can be done.

S75 : In other words, Epic doesn't care so that the projek is awarded to somebody and to sub-contract to somebody else?

J : Bukan macam itu.

S76 : Then what is it are you trying to say?

J : Kita mesti melantik Malaysian company tapi dia mesti convince kita dia ada partner yang ada experience untuk buat kerja itu.

S77 : Dalam kes ini, in other words, Kondisi Utama was appointed as a sub-contractor because Kondisi Utama had a partner that can do dredging works. Is that correct?

J : Yes.

S78 : Now this partner that supposed to do the dredging work together with Kondisi Utama is Baltic Agencies because you had been dealing with them all the while. Do you agree?

J : Not only Baltic. Ada company juga Kondisi bawa.

S79 : But throughout until the day the thing came up to court it has been Baltic Agencies and Captain Shaukath Ali. Do you agree?

A : [no answer recorded]

[92] The e-mails tendered in evidence and the oral evidence of Shaukath, PW2, Ramli and Amarjeet clearly show that it was Baltic who made efforts at its own expense to obtain Sical Portofino. It is also very clear that Sical Portofino was the final choice of Ramli who went to India to view the vessel.

[93] EPIC, through Ramli, had clearly been involved in the choice of dredgers to be obtained for the works and he had clearly been dealing with Baltic, with the involvement of Kondisi. Why would he do that if EPIC's contract was with Kondisi alone?

[94] Despite Ramli's claims that he never read the e-mails sent by Baltic, particularly from Shaukath (which we do not think is probable given the value of the contract and the importance of the works to EPIC as admitted by Ramli), it is quite clear that Ramli was being constantly made aware directly by Baltic of the developments in Baltic's efforts to procure dredgers for the works.

[95] Both Ramli and Amarjeet denied that they had agreed to alternative dredgers being sourced in place of Sical Portofino. Both of them claimed that Baltic had breached its contract with Kondisi when Sical Portofino could not be obtained. But Baltic's evidence was that EPIC and Kondisi had been both kept abreast of the developments in its attempt to get Sical Portofino. We do not think that Baltic was not being truthful despite Ramli's and Amarjeet's denial of having been so kept informed, because there is, in particular, the matter of the agreement signed between AA Dredgers and Baltic dated 7 October 2011 witnessed by Amarjeet.

[96] Under the 7 October 2011 agreement, AA Dredgers agreed to provide and operate three dredgers for the works, the first dredger to arrive at the site of the works after 30 October 2011. This led to AA Dredgers entering into an agreement with KSE Marine Works Pte Ltd on 13 October 2011 for the charter of KSE's vessels.

[97] Then came the letter dated 14 October 2011 from EPIC to the JV in relation to the obtaining of domestic shipping licences for the KSE vessels which were specifically named in the letter, and subsequently the letter of offer to the JV dated 30 October 2011.

[98] In his witness statement, Ramli claimed that the letters dated 14 October 2011 and 30 October 2011 were mere drafts. But his reasons for the drafts being issued were quite interesting. He said:

> Saya telah mengeluarkan deraf surat-surat ini untuk membolehkan Defendan Kedua dan Plaintif mendapatkan vessel/dredger lain untuk projek tersebut setelah Plaintiff gagal mendapatkan SICAL PORTOFINO pada 15/10/2011. Plaintif telah meminta surat-surat ini dikeluarkan agar untuk membolehkan Plaintif memasuki kontrak dengan pihak baru untuk mendapatkan dredger baru.

[99] Ramli was singing a different tune during cross-examination. During cross-examination, he said that the letter dated 14 October 2011 was issued to enable the vessels which were already in the open sea to get into safe harbour because of the monsoon season. This raised a few questions in our minds:

(a) if the vessels were brought in by Kondisi or Baltic, why was it necessary for EPIC to ask the JV to obtain the domestic shipping licences?

(b) surely the chief executive officer of a public-listed company does not, as claimed by Ramli, simply sign a letter at the request of a party when that party has no relationship with the company?

(c) the evidence shows that the vessels only reached the site on 24 October 2011, but why was the letter dated some ten days earlier if it was indeed issued to enable the vessels which were already in the open sea, according to Ramli, to come into safe harbour?

[100] As for the letter dated 30 October 2011, even if it was a draft, why should Ramli issue it when on 16 October 2011 EPIC had issued a letter of offer for the works to Kondisi and on 17 October 2011 Kondisi had accepted the offer?

[101] It is our considered view that the totality of the evidence before the court clearly shows that while neither EPIC nor Kondisi was a party to the 7 October 2011 agreement between Baltic and AA Dredgers or the agreement dated 13 October 2011 between AA Dredgers and KSE (as was repeatedly stressed upon during the cross-examination of Baltic's witnesses and in submissions before us) EPIC and Kondisi were all along not only aware of Baltic's efforts to procure dredgers for the works in place of Sical Portofino, but had also agreed to such replacements.

[102] The manner in which the parties conducted themselves gives rise, to our minds, to only one conclusion: that EPIC was dealing with Kondisi and Baltic as if Kondisi and Baltic were in a joint venture for the works.

[103] We acknowledge that the JV is not a party to this case. We also acknowledge that the reliefs claimed by Baltic against EPIC are principally for declarations that there was a valid contract dated 30 October 2011 between EPIC and Baltic.

[104] However, as against Kondisi, the JV is not an issue. Baltic claimed reliefs against Kondisi in relation to the letters dated 10 May 2011 and 2 August 2011.

[105] The question we need to answer, as we have stated earlier, is whether the Court of Appeal was correct in its findings that an implied contract had been made partly in writing (based on the letters mentioned above) and partly by conduct and/or performance between Baltic and Kondisi and between EPIC and the unincorporated JV.

[106] The letter dated 14 October 2011 addressed to the JV was clearly not a draft. As we have stated above, Ramli's evidence during cross-examination negates his evidence in his witness statement that it was a draft. That letter was definitely issued to the JV. But how would the JV, which was obviously unincorporated, act? A number of questions were posed to the various witnesses by EPIC's and Kondisi's counsel to show that the JV did not exist. Among the questions posed to PW2 was how could a cheque be issued to an entity which did not exist. PW2's answer was that that was the reason an account had to be opened. He admitted that there was no account opened in the JV's name.

[107] We note from the letter dated 14 October 2011 that the JV was using Kondisi's address as its address. The JV also had a solution to the account problem.

[108] As mentioned earlier in this judgment, we admitted a letter dated 4 August 2011. That letter was written on the letterhead of "Kondisi Utama Sdn Bhd. Baltic Agencies Pte Ltd. JV", addressed to EPIC, and signed by one Muhammad bin Hamzah as General Manager. The letter instructed EPIC to issue all progress payments for the works to Kondisi and into Kondisi's Maybank account.

[109] If there was no JV in existence, how could a letter be issued on the JV's letterhead to EPIC instructing EPIC how and to whom progress payments were to be paid?

[110] We have also closely examined the letter dated 2 August 2011. The contents of that letter show that, probably pursuant to the meeting held on 30 July 2011 at EPIC's office, the parties had in all likelihood agreed that the works would be undertaken by Baltic and Kondisi jointly. Hence the JV.

[111] The first paragraph of the 2 August 2011 letter states that Kondisi was "pleased to appoint" Baltic "to handle the dredging project". This is unlike the letter dated 10 May 2011 by which Kondisi appointed Baltic as its "sub-contractor" for the works.

[112] The letter dated 2 August 2011, unlike the one dated 10 May 2011, does not state the period of contract or the contract sum. Instead, Kondisi was to pay Baltic certain amounts for certain specific heads. For example, Kondisi would pay Baltic in advance for the costs for applying for the domestic shipping licence for Sical Portofino, and would pay USD 5,000 monthly to Baltic throughout the project period towards travelling and accommodation for "the team".

[113] The 2 August 2011 letter shows that the obligations involved in executing the works would be shared by Kondisi and Baltic. The following are examples of what had to be performed by Kondisi:

(a) "Kondisi would take care of shore handling, levelling, equipments, rivertments, bunds to dump the dredged materials of 6 million cubic metres";

(b) "Fuel Consumption: The operational fuel consumption will be around 21 MT/24 hours of operation (max). Fuel/Bunkers will be on Charterer's (Kondisi) account. Baltic can assist Kondisi in sourcing fuel of 1000 Metric tons every 45 days at a competitive rate from Singapore";

(c) "Fresh Water: will be on charterer's (Kondisi's) account. Baltic will assist sourcing".

(d) "Kondisi to obtain work permits for the foreign crew on Kondisi account and Baltic will assist in the process".

[114] It is also interesting to note that if Baltic was to act as an independent subcontractor for the works, there would have been no necessity to provide in the letter dated 2 August 2011 matters such as the following:

(a) "Normal Operation hours: will be around 16 Hours depending upon the weather conditions, swell and other operational conditions prevalent at the site";

(b) "Monitoring of operations - Baltic representative will be onboard the dredger during the duration of the project to monitor the operation and will give daily status report to us, which will be shared Kondisi/EPIC";

(c) "Booster pumps Baltic to revert on installation/requirement of booster pumps to increase pumping rate".

[115] In our view, the letter dated 2 August 2011 supports our finding that it was always the intention of the parties that Kondisi and Baltic would work together to perform the works. This was before the actual arrival of the first dredger at the site.

[116] AA Dredgers issued an invoice dated 12 October 2011 (five days after the agreement it entered into with Baltic for the KSE vessels) addressed to Baltic and Kondisi, seeking the payment of USD 200,000 to be remitted by 13 October 2011 and for USD 1,945,000 to be paid within three days of the arrival of the first dredger, KSE Hitachi. Kondisi paid the sum of USD100,000 on 18 October 2011.

[117] Amarjeet admitted payment but denied that payment was made pursuant to the invoice. Amarjeet claimed that the amount was paid to Baltic at Baltic's request "to enable them to go and source dredgers from Korea".

[118] We find it quite strange for Kondisi to pay Baltic an advance of USD100,000 to merely source dredgers from Korea in October 2011 when Kondisi had by then claimed that Baltic had breached its contract of 2 August 2011 to bring in Sical Portofino and that it had nothing to do with Baltic after that. Why should USD100,000 (half of the invoiced amount) be paid for the purpose of sourcing dredgers from Korea in those circumstances? We also note that no amount was paid to Baltic when it made the arrangements to go to India and when it made all the attempts to obtain Sical Portofino.

[119] The only reasonable conclusion that we can make is that the amount of USD100,000 was indeed paid by Kondisi on 18 October 2011 (one day after it purportedly accepted the letter of offer for the works issued by EPIC) in payment of its share of the amount in AA Dredger's invoice. This supports the existence of the JV and the contract between EPIC and the JV.

Breach

[120] We note that while the agreement dated 7 November 2011 promised that the first dredger would arrive on site after 30 October 2011, it had actually arrived on 24 October 2011. By that time the letter of offer dated 16 October 2011 had already been issued to Kondisi by EPIC and accepted by Kondisi on 17 October 2011.

[121] We hesitate to agree with Baltic's contention that the letter dated 16 October 2011 was backdated, but several questions do come to mind which we find rather disquieting:

(a) why the need for a letter of offer dated 16 October 2011 when, as we have stated above, it was clear that there was obviously already a contract in existence between EPIC and Kondisi by 10 May 2011?

(b) why issue a letter of offer to Kondisi merely two days after issuing the letter to the JV with regard to the domestic shipping licences?

(c) even if the letter dated 30 October 2011 was a draft, why was it even prepared if a letter of offer was indeed issued on 16 October 2011?

[122] All these lend credence to Baltic's claim that EPIC and Kondisi had deliberately sidelined Baltic and deprived it of the gains it would have received had EPIC proceeded with the contract with the JV.

Unpleaded Claims

[123] We deal now with issue of Baltic's claims not being pleaded in its amended statement of claim.

[124] We have carefully examined Baltic's amended statement of claim. There can be no doubt that Baltic's complaint is essentially that both EPIC and Kondisi had caused Baltic to believe that it was being engaged to perform the works and had caused Baltic to take steps and to spend time and to incur expenses in the attempt to obtain Sical Portofino, and when that was unsuccessful to obtain a replacement dredger and other vessels. When Baltic succeeded in obtaining the necessary vessels, EPIC and Kondisi had sidelined Baltic and shut it out completely from the works. The specific pleaded reliefs notwithstanding, in our view neither EPIC nor Kondisi was under any misapprehension that that was the complaint against them.

[125] This court in the case of *Gurbachan Singh Bagawan Singh & Ors v. Vellasamy Pennusamy & Other Appeals* [2015] 1 CLJ 719 held that evidence adduced during the hearing can overcome the defects in pleadings as long as the other party is not taken by surprise, especially if the evidence was given without any objection by the other party. The court referred to the judgment of the Supreme Court in the case of *Superintendent of Lands and Surveys, 4th Division & Anor v. Hamit Matusin & Ors* [1994] 3 CLJ 567. In that case, Peh Swee Chin SCJ, delivering the judgment of the Supreme Court said, at p. 572:

As was stated by the Federal Court in *Ang Koon Kau & Anor v. Lau Piang Ngong* [1984] 2 MLJ 277, FC at page 278:

> Evidence given at the trial can therefore in appropriate circumstances overcome defects in the pleadings where the net result of such evidence is to prevent the other side from being taken by surprise.

There is however, at least one important exception to such curing of defect of pleading by evidence departing from such pleading without objection then and there to such evidence.

The exception is when such evidence represents a radical departure from the pleading, and is not just a variation, modification or development of what has been alleged in the pleading in question, please see *Waghorn v. George Wimpey & Co. Ltd,* [1969] 1 WLR 1764, which gave rise to the proposition, which was approved by *Ang Koon Kau & Anor v. Lau Piang Ngong*, *supra,* and *John Stein & Co. Ltd v. O'Hanlon* [1965] AC 890.

[126] As we have shown above, EPIC and Kondisi were certainly not taken by surprise by and did not object to the evidence given by witnesses for Baltic. Evidence was led during cross-examination of their own witnesses which supported Baltic's position.

[127] We are therefore of the view that what Baltic lacked in pleading was more than made up for by the evidence before the High Court.

Decision

[128] Based on our analysis above, we are unanimous in our view that a contract had come into existence between EPIC and the informal joint venture partnership of Kondisi and Baltic. That joint venture clearly existed and EPIC and Kondisi had clearly admitted its existence by the actions taken by Ramli and Amarjeet.

[129] We also find that the evidence shows that EPIC had breached that contract by offering Kondisi the contract by the letter dated 16 October 2011 and Kondisi had breached its joint venture agreement with Baltic by accepting that offer on 17 October 2011 and subsequently choosing to utilise the KSE vessels procured by Baltic and keeping Baltic out of the works.

[130] The Court of Appeal, in our view, made the correct decision in allowing Baltic's claim and ordering damages to be assessed.

[131] We therefore dismiss these appeals with costs.

[132] In the circumstances of this case, the outcome of which is dependent purely on the finding of facts, we do not find any necessity to answer any of the leave questions.

[133] Finally, we wish to state that this judgment is delivered pursuant to s. 78 of the Courts of Judicature Act 1964 as our brothers, Zulkefli Ahmad Makinuddin and Prasad Sandosham Abraham, have retired. However, our brother Zulkefli Ahmad Makinuddin had read this judgment in draft and expressed his agreement to it prior to his retirement.

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